IN THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai

Before Shri M. Balaganesh, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.7249/Mum/2017
(Assessment Year: 2011-12)

Tech Mahindra Ltd. Gateway Building, Apollo Bunder, Mumbai – 400001	Vs.	Pr. Commissioner of Income tax-2, Room No. 344, Aayakar Bhavan M.K. Road, Mumbai – 400020

PAN – AAACM3484F

(Appellant) **(Respondent)**

Appellant by: Shri J.D. Mistry &
Shri Harsh Kapadia, A.Rs
Respondent by: Shri R.Manjunatha Swami, D.R

Date of Hearing: 18.09.2019
Date of Pronouncement: 11.10.2019

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the Pr. Commissioner of Income Tax -2, (for short 'Pr. CIT'), Mumbai, under Sec.263 of the Income Tax Act, 1961 (for short 'Act'), dated 24.10.2017 for A.Y. 2011-12. The assessee has assailed the impugned order on the following grounds of appeal:

"Being aggrieved by the order under section 263 of the Income-tax Act, 1961 ('the Act') passed by the Principal Commissioner of Income-tax - 2, Mumbai (hereinafter referred to as the CIT'), the Appellant hereby submits the following grounds of appeal:

1. On the facts and circumstances of the case and in law, the learned CIT erred in passing an order under Section 263 of the Act in the name of 'Satyam Computer Services Limited' even though the company was not in existence having been dissolved upon its amalgamation with the Appellant.
2. The Appellant submits that the order passed in the name of an assessee not in existence be struck down and annulled as ab initio or otherwise null and void.
3. The order of the learned CIT is bad in law, erroneous, in excess of want of jurisdiction and otherwise void.

4. On the facts and circumstances of the case and in law, the learned CIT erred in holding that the order under Section 143(3) of the Act was erroneous and prejudicial to the interests of the revenue.
5. On the facts and circumstances of the case and in law, the revisionary proceedings under Section 263 of the Act are bad in law in absence of any new fact, information, corroborative evidence or material being made available by the CIT, the impugned order under Section 263 of the Act be annulled and quashed.
6. On the facts and circumstances of the case and in law, the revisionary proceedings under Section 263 of the Act merely on the basis of findings of the internal audit objections of the income tax department are bad in law and required to be quashed.
7. On the facts and circumstances of the case and in law, the learned CIT erred in not appreciating the fact that the settlement amount of Rs.569 crores was paid by the Appellant out of commercial expediency and is not attributable to any offence or an act prohibited by any law and hence, the same is not disallowable under Section 37 of the Act.

The Appellant craves leave to add, amend, delete, rectify, substitute and modify any of the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing the appeal."

2. Briefly stated, M/s Satyam Computers Services (merged with Tech Mahindra Ltd.) which was engaged in the business of Software development had e-filed its return of income for A.Y. 2011-12 on 30.11.2011, declaring its total income at Rs.nil under the normal provisions of the Act. The return of income filed by the aforementioned assessee viz. M/s Satyam Computers Services Ltd. was processed as such under Sec. 143(1) of the Act on 08.03.2011. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2) of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the aforesaid assessee company viz. Satyam Computers Services Ltd. had subsequently been merged with M/s Tech Mahindra Ltd., which also was being assessed in the same charge. Also, it was noticed by him that the merger of Satyam Computers Services Ltd. with M/s Tech Mahindra Ltd. had taken place w.e.f 01.04.2011, and subsequent to the said merger the existing proceedings against Satyam Computers Services Ltd. were taken over by Tech Mahindra ltd. A draft assessment order was passed by the A.O under Sec. 143(3) r.w.s 144C(1), dated 27.03.2015. Final assessment order under Sec. 143(3) r.w.s 144C(3), dated 25.05.2015, determining the total income at Rs.37,87,44,908/- was passed in the hands of the aforementioned assessee viz. M/s Satyam Computers Services Ltd.

4. Observing, that the A.O while framing the assessment under Sec.143(3) r.w.s 144C(3), dated 25.05.2015 had erroneously allowed an amount of Rs.569 crores on account of class

action settlement consideration, the Pr. CIT was of the view that the assessment framed by the A.O was erroneous insofar it was prejudicial to the interest of the revenue. Also, the Pr. CIT held a conviction that the A.O while framing the assessment had erred in not disallowing the civil monetary penalty of Rs.44.71crores which was claimed by the assessee as an expenditure in its profit and loss account. Accordingly, the Pr. CIT called upon the assessee to explain as to why the order passed by the A.O under Sec. 143(3) r.w.s 144C(3), dated 25.05.2015 may not be revised under Sec.263 of the Act. The explanation advanced by the assessee that no infirmity did emerge from the assessment framed by the A.O. however, did not find favour with the Pr. CIT. Accordingly, the Pr. CIT held the assessment order passed by the A.O under Sec. 143(3) r.w.s 144C, dated 25.05.2015 as erroneous insofar it was prejudicial to the interest of the revenue and directed the A.O to disallow the claim of expenses of Rs.569 crores that was raised by the assessee on account of class action settlement consideration. As regards the claim of civil monetary penalty of Rs.44.71 crores was concerned, it was observed by the Pr. CIT, that though prima facie the said amount was not eligible for deduction, but as the assessee had claimed that the same was deducted from the reserve created in financial year 2008-09, hence no adverse inference was to be drawn as regards the said issue subject to verification of the records by the A.O. At this stage, it would be relevant to point out that the order under Sec. 263 of the Act, dated 24.10.2017 was passed by the Pr. CIT in the name of the assessee viz. “M/s Satyam Computers Services Ltd. (now merged with Tech Mahindra Ltd.) registered office Gateway Building Apollo Bundar, Mumbai- 400001”. Also, the PAN Number referred in the order was that of the aforestated erstwhile amalgamating company viz. M/s Satyam Computers Services Ltd.

5. Aggrieved, the assessee has assailed the order passed by the Pr. CIT under Sec. 263, dated 24.10.2017 in appeal before us. The ld. Authorized Representative (for short ‘A.R’) for the assessee at the very outset of the hearing of the appeal submitted that M/s Satyam Computers Services Ltd. had merged with the assessee company viz. M/s Tech Mahindra Ltd. w.e.f 01.04.2011. It was submitted by the ld. A.R, that though the fact that M/s Satyam Computers Services Ltd. had merged with the assessee company was well in the notice of the A.O, however, he had framed the assessment under Sec. 143(3) r.w.s 144C(3), dated 25.05.2015 in the name of “M/s Satyam Computers Services Ltd.”. Also, it was submitted by him, that the Pr. CIT-2, Mumbai too had passed the order under Sec. 263 of the Act, dated

24.10.2017 in the name of the "M/s Satyam Computers Services Ltd. (now merged with Tech Mahindra Ltd.)", despite the fact that the same was non-existent on the date of passing of such order. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that the assessment framed in the name of the amalgamating company viz. M/s Satyam Computers services Ltd. which had ceased to exist in the eyes of law, was thus invalid and untenable in law. It was averred by the ld. A.R, that the A.O despite being well informed of the fact that M/s Satyam Computers Services Ltd. which had merged with the assessee company w.e.f 01.04.2011, had thus ceased to exist, however, had framed the assessment in the hands of the said non-existent entity. In order to drive home his contention that an assessment on a non-existent entity was invalid in the eyes of law, the ld. A.R had drawn support from the judgment of the Hon'ble Supreme Court in the case of Pr. CIT, New Delhi Vs. Maruti Suzuki India Ltd. (Civil Appeal No. 5409 of 2019) [arising out of SLP (C) No. 4298 of 2019], dated 25.07.2019 (copy placed on record). It was submitted by the ld. A.R, that as the assessment order passed by the A.O under Sec. 143(3) r.w.s 144C(3), dated 25.05.2015 having been passed in the hands of the non-existent entity was non-est in the eyes of law, therefore, the order passed by the Pr. CIT-2, Mumbai under Sec. 263, therein revising the said order would not stand on a better footing. In order to fortify his contention that both the assessment order and the revisional order under Sec. 263 were passed in the hands of a non-existent entity viz. M/s Satyam Computers Services Ltd., the ld. A.R had drawn our attention to the fact that in both the respective orders the PAN Number of the aforesaid amalgamating entity i.e "AACCS8639Q" was mentioned. The ld. A.R in order to substantiate his claim that an assessment framed in the hands of a non-existent company is non-est in law, relied on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. M/s Spice Enfotainment Ltd. (Civil Appeal No. 285 of 2014, dated 02.11.2017). Also, reliance was placed by the ld. A.R on certain orders of the coordinate benches of the Tribunal viz. (i) Westlife Development Ltd. Vs. Pr. CIT (2017) 88 taxman.com 439 (Mum); (ii) M/s Classic Flour & Food Processing Vs. CIT (ITA No.746 to 766/Kol/2014) (Kol); (iii) Reliance Capital Ltd. Vs. Pr. CIT (ITA No. 3331/Mum/2016) (Mum); (iv) Reliance Capital Ltd. Vs. Pr. CIT (ITA No.3811/Mum/2017) (Mum); (v) Krishnan Kumar Saraf Vs. CIT (ITA No. 4562/Del/2011) (Del); (vi) Inder Kumar Bachani (HUF) Vs. ITO (2006) 99 ITD 621 (Luck); (vii) M/s Emerald Company Ltd. Vs. ITO (ITA No.428/Kol/2015) (Kol); (viii) Ingram Micro India Pvt. ltd Vs. DCIT (ITA No.8793/Mum/2011) (Mum); (ix) Gestetner (India) Ltd. Vs.

ACIT (ITA No.275/Kol/2007) (Kol). On the basis of his aforesaid contention, it was the claim of the ld. A.R that as both the assessment order and also the order passed under Sec. 263 were in the name of the amalgamating company viz. M/s Satyam Computers Services Ltd, which was non-existent on the respective dates when the said orders were passed, therefore, the same were null and void ab initio. Alternatively, it was submitted by the ld. A.R that the Pr. CIT could not have revised an order passed under Sec. 143(3) which in itself was non-est in the eyes of law. In support of his aforesaid contention the ld. A.R had relied on the order of the ITAT, Mumbai Bench "G" in the case of West Life Development Ltd. Vs. PCIT-5, Mumbai (2017) 88 taxman.com 439 (Mum).

6. Per contra, the ld. Departmental Representative (for short 'D.R') submitted that no infirmity did emerge from the order passed by the Pr. CIT under Sec. 263 of the Act. It was submitted by the ld. D.R that the mention of the name of the amalgamating company viz. Satyam Computers Services Ltd. in the assessment order and also the order passed under Sec.263 by the Pr. CIT was merely a technical mistake which by no means would suffice for characterising the said orders as non-est in the eyes of law.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them in support of their respective contentions. In order to appreciate the nature of the controversy involved in the present appeal, the narration of the facts would be instructive. M/s Satyam Computers Services Ltd. was initially incorporated as Satyam Computers Pvt. Ltd. at Hyderabad on 24.06.1987. Objects of the company were to undertake design and development system and application software either for its own use or for export. On 15.07.1991 the company changed its name to M/s Satyam Computers Services ltd. Subsequently, on 26.08.1991, the company went public and 81.22% shareholding was offered to the public. M/s Satyam Computers Services ltd. was subsequently merged with the assessee company i.e M/s Tech Mahindra Ltd. w.e.f 01.04.2011. Subsequent to the aforesaid merger, the existing proceedings against Satyam Computers Services Ltd. were taken over by the assessee company.

8. Admittedly, as is discernible from the assessment order the fact that M/s Satyam Computers Services Ltd. had been merged with M/s Tech Mahindra Ltd. 01.04.2011 was clearly to the knowledge of the assessing officer. In fact, a specific mention of the fact that M/s Satyam Computers Services Ltd. had merged with the assessee company on 01.04.2011 and all the existing proceedings against it were taken over by the assessee company finds a specific mention in the assessment order passed by the A.O under Sec. 143(3) r.w.s 144C(3), dated 25.05.2015. However, we find that despite being conversant of the fact that M/s Satyam Computers Services Ltd. having been merged with the assessee company i.e M/s Tech Mahindra Ltd. w.e.f 01.04.2011, was thus no more existing, the A.O had framed the assessment in the name of the said non-existent entity viz. M/s Satyam Computers Services ltd., vide his order passed under Sec. 143(3) r.w.s 144C(3), dated 25.05.2015. As a matter of fact, we find that even the PAN Number stated in the assessment order i.e "AACCS 8639Q" is of the aforesaid amalgamating company i.e M/s Satyam Computers Services Ltd. As is discernible from the records, the Pr. CIT-2, Mumbai, also had thereafter passed the order under Sec. 263 of the Act, dated 24.10.2017 in the name of the non-existent entity viz. "M/s Satyam Computers Services Ltd. (now merged with Tech Mahindra Ltd.)". At this stage, it would be relevant to point out that even in the aforesaid order passed by the Pr. CIT under Sec. 263 of the Act, the PAN Number of M/s Satyam Computers Services Ltd. i.e AACCS8639Q was mentioned. In sum and substance, a perusal of the orders of the lower authorities reveals beyond any scope of doubt that the respective orders under Sec.143(3) r.w.s 144C(3), dated 25.05.2015 and under Sec. 263 of the Act, dated 24.10.2017, were passed in the name of a non-existent entity viz. M/s Satyam Computers Services Ltd.

9. We shall now deliberate on the validity of the impugned order passed by the Pr. CIT-2, Mumbai, under Section 263 of the Act, dated 24.10.2017. The issue involved in the present appeal lies in a narrow compass i.e. as to whether the order passed in the name of a non-existent company would be sustainable in the eyes of law, or not. We find that the issue hereinabove involved is no more res integra pursuant to the judgement of the **Hon'ble Supreme Court** in the case of **Pr. CIT, new Delhi Vs Maruti Suzuki India Ltd. (Civil appeal No. 5409 of 2019, dated 25.07.2019)**. We shall briefly cull out the facts which were involved in the aforesaid case before the Hon'ble Apex Court. The assessee was a joint Venture between

Suzuki Motor Corporation and Maruti Suzuki India Ltd. Initially, the assessee upon incorporation was known as Suzuki Motor India Ltd. Subsequently, w.e.f 08.02.2015, its name was changed to Suzuki Powertrain India Ltd. On 28.11.2012, the assessee had filed its return of income in the name of Suzuki Powertrain India Ltd. (no amalgamation having been taken place on the relevant date). On 29th January, 2013 a scheme for amalgamation of Suzuki Powertrain India Ltd. and Maruti Suzuki India Ltd. was approved by the High court w.e.f 01.04.2012. As per the terms of the approved scheme the liabilities and duties of the transferor company were to stand transferred to the transferee company without any further act or deed. On 2nd April, 2013, Maruti Suzuki India Ltd. intimated the A.O about the amalgamation. The case was selected for scrutiny and a notice under Sec.143(2) of the Act was issued on 26.09.2013, followed by a notice under Sec.142(1) to the amalgamating company. On 22nd January, 2016, the Transfer Pricing Officer passed an order under Sec. 92CA(3) of the Act. On 11th March, 2016, a draft assessment order was passed in the name of Suzuki Powertrain (amalgamated with Maruti Suzuki India ltd.). It is a matter of fact that the assessee viz. Maruti Suzuki India Ltd. had participated in the assessment proceedings of the erstwhile amalgamating entity i.e Suzuki Powertrain India Ltd., through its authorized representatives and officers. On 14th October, 2016, the DRP issued its order in the name of Maruti Suzuki India Ltd. (as successor in interest of eartwhile Suzuki Powertrain India Ltd. since amalgamated). The final assessment order was passed on 31st October, 2016 in the name of Suzuki Powertrain India Ltd. (amalgamated with Maruti Suzuki India Ltd.). On appeal, the Tribunal set aside the final assessment order on the ground that it was void ab initio having been passed in the name of the non-existent entity by the A.O. The decision of the Tribunal was affirmed by the Hon'ble High Court of Delhi. On further appeal by the revenue, the Hon'ble Supreme Court dismissed the appeal by observing that though the A.O was aware of the fact that the amalgamating company had ceased to exist as a result of the approved scheme of amalgamation, however, the notice was issued in its name. It was observed by the Hon'ble Court that the basis on which the jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Also, it was observed by the Hon'ble Apex Court that participation in the proceedings by the assessee would not operate as an estoppel against law. While observing as hereinabove, the Hon'ble Court had relied on its earlier order in the case of **CIT Vs. M/s Spice**

Enfotainment Ltd. (Civil Appeal No. 285 of 2014), dated 02.11.2017, wherein the order of the Hon'ble High Court of Delhi was affirmed and the SLP filed by the revenue was dismissed. In fact, we find that the **Hon'ble Supreme Court** in the case of **CIT Vs. M/s Spice Enfotainment Ltd. (Civil appeal No. 285 of 2014)**, had upheld the order of the Hon'ble High Court of Delhi, which while allowing the appeal of the assessee, had concluded, that where the A.O had framed the assessment in the hands of a non-existent entity, the proceedings and the assessment order so passed would be clearly void and could not be classed as a procedural irregularity of a nature which could be cured by invoking the provisions of Sec. 292B of the Act. The Hon'ble High Court of Delhi while concluding as hereinabove had relied on the judgment of the **Hon'ble Supreme Court** in the case of **Saraswati Industrial Syndicate Ltd. Vs. CIT, 186 ITR 278**, wherein it was observed, that it was trite law that on amalgamation, the amalgamating company ceases to exist in the eyes of law. The Hon'ble Supreme Court while concluding as hereinabove had observed as under:

> "The question is whether on the amalgamation of the India Sugar Company with the appellant Company, the Indian Sugar Company continued to have its entity and was alive for the purposes of Section 41(1) of the Act. The amalgamation of the two companies was effected under the order of the High Court in proceedings under Section 391 read with Section 394 of the Companies Act. The Saraswati Industrial Syndicate. the trans free Company was a subsidiary of the Indian Sugar Company, namely, the transferor Company. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29th October, 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee Company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that Company incurred or it could incur, any liability, before the dissolution or not thereafter.
>
> Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending Company become substantially the share holders in the Company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new Company, or by the transfer of one or more undertakings to an existing Company. Strictly amalgamation does not cover the mere acquisition by a Company of the share capital of other Company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See Halsburys Laws of England 4th Edition Vol. 7 Para 1539. Two companies may join to form a new Company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third Company or one is absorbed into one or blended with another, the amalgamating Company loses its entity."

On the basis of our aforesaid deliberations, it can safely be concluded that the assessment order passed by the A.O under Sec. 143(3) r.w.s 144C(3), dated 25.05.2015 in the hands of M/s Satyam Computers Services ltd., i.e an entity that was on the date on which the assessment order was passed was non-existent, would thus be non-est in the eyes of law. Now, in the backdrop of the aforesaid facts, we shall deliberate on the sustainability of the order passed by the Pr. CIT under Sec. 263 of the Act, dated 24.10.2017, which as observed by us hereinabove is found to be in the name of "Satyam Computes Services Ltd. (now merged with Tech Mahindra Ltd.)" with a specific mention of the PAN Number of the said amalgamating company. To sum up, even the order passed by the Pr.CIT-2, Mumbai, under Sec. 263 is found to be in the name of a non-existent viz. M/s Satyam Computers Services Ltd., which as observed by us hereinabove, had merged with the assessee company way back w.e.f 01.04.2011. Accordingly, on the basis of our aforesaid deliberations that an order passed in the hands of a non-existent entity has no sanctity of law, and thus is nothing better than nullity, therefore, as per the settled position of law as had been so laid down by the Hon'ble Supreme Court in the case of Maruti Suzuki India Ltd. (supra) and M/s Spice Enfotainment Ltd. (supra), we are of the considered view that the order passed by the Pr. CIT-2, Mumbai, cannot be sustained and is liable to be vacated on the said count itself. Apart there from, we are also persuaded to subscribe to the claim of the ld. A.R that in case the assessment in itself having been framed in the hands of a non-existent entity is found to be non-est in the eyes of law, the same thereafter cannot be revised by the CIT under Sec. 263 of the Act. In fact, we are of a strong conviction that an assessment order which in itself is found to be non-est in the eyes of law cannot be revised by the CIT, for the reason, that the same would imply extending/granting fresh limitation to the A.O for passing of a fresh assessment order. Our aforesaid view is fortified by the order of a coordinate bench of the Tribunal i.e **ITAT, Mumbai "G" Bench** in the case of **West Life Development Ltd. Vs.PCIT-5, Mumbai (2017) 88 taxman.com 439 (Mum)**. Accordingly, in the backdrop of our aforesaid observations, we are of the considered view that now when the assessment order passed by the A.O under Sec. 143(3) r.w.s 144C(3), dated 25.05.2015 is in itself found to be non-est in the eyes of law, therefore, the Pr. CIT-2, Mumbai could not have revised the same in exercise of the powers vested with him under Sec.263 of the Act. As such, on the basis of our aforesaid deliberations, we are of the considered view that the order passed by the Pr. CIT under Sec. 263, dated 24.10.2017 cannot be sustained on two

counts viz. (i) that, the order of revision u/s 263 has been passed by the Pr. CIT in the name of M/s Satyam Computers Services, i.e a company which was non-existent on the date of passing of the order; and (ii) that, the Pr. CIT in exercise of his power under Sec. 263 was divested on his jurisdiction of revising an assessment order which in itself was non-est in the eyes of law. We thus on the basis of our aforesaid observations quash the order passed by the Pr. CIT under Sec.263 of the Act, dated 24.10.2017, on the ground of invalid assumption of jurisdiction on his part. As we have quashed the order passed by the Pr. CIT-2, Mumbai, under Sec.263 of the Act, for want of jurisdiction, therefore, we refrain from adverting to the merits of the issues therein involved, which thus are left open.

10. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 11.10.2019

Sd/-	Sd/-
(M.Balaganesh)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 11.10.2019
PS. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**